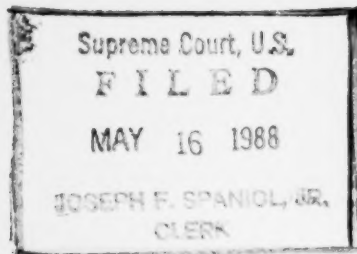


87-1906



No. ....

In the Supreme Court  
OF THE  
United States

OCTOBER TERM 1987

L. E. MORRISON and JEAN MORRISON,  
*Petitioners,*

vs.

COUNTY OF SAN DIEGO,  
*Respondent.*

PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Have the California state courts improperly employed purported state procedural barriers to abridge the federal constitutional mandate of this Court that just compensation requires consideration of the value of the property taken as of the date of actual payment?

2. Is *Kirby Forest Industries v. United States*, 467 U.S. 1 (1984), binding on California state courts?

3. Do the constitutional mandates of *Kirby Forest* take precedence over state procedural rules?

4. Should this case be reversed and remanded for a hearing limited to "the issue of how the market value of the property altered between [the date of original valuation] and the date on which the judgment was paid by the Government," *Kirby Forest*, 467 U.S. at 18?

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No. ....

# In the Supreme Court

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OCTOBER TERM 1987

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L. E. MORRISON and JEAN MORRISON,  
*Petitioners,*

VS.

COUNTY OF SAN DIEGO,  
*Respondent.*

---

## **PETITION FOR WRIT OF CERTIORARI**

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Petitioners L. E. Morrison and Jean Morrison respectfully pray that a writ of certiorari issue to review the order of the California Supreme Court denying hearing and the opinion of the California Court of Appeal, Fourth Appellate District, which affirmed a judgment in condemnation valuing petitioners' condemned property as of February 16, 1973, when payment was not tendered until May 9, 1980, and in the intervening period, the effects of inflation were dramatic and the value of the property had increased even more dramatically. These California state court decisions directly conflict with the ruling of this Court in *Kirby Forest Industries v. United States*, 467 U.S. 1 (1984).

## OPINIONS BELOW

The order of the California Supreme Court issued on February 17, 1988, denying a hearing in the California Supreme Court, is set forth in Appendix A, *infra*. The opinion of the California Court of Appeal, Fourth Appellate District, filed November 25, 1987, is set forth in Appendix B, *infra*.

## JURISDICTION

The order of the California Supreme Court denying hearing was filed on February 17, 1988. This was the final action of the highest court of the state. This action had the effect of affirming and allowing to stand the opinion of the California Court of Appeal, of which review is sought. Jurisdiction of this Court is proper pursuant to 28 U.S.C.A. § 1257(3).

## INTRODUCTION

In 1980, the County of San Diego ("Condemnor") took 69 acres of land from the Morrisons by eminent domain. Condemnor paid the Morrisons the fair market value of the land — as of 1973, the date it commenced its eminent domain action. But,

- It did not pay that sum until 1980.

The Morrisons lost all the appreciated value of their land from 1973 to 1980.

This result directly contradicts the rule of *Kirby Forest Industries v. United States*, 467 U.S. 1 (1984), in which this Court said the Fifth Amendment of the United States Constitution requires a governmental entity which takes private property by eminent domain to pay the property owner the fair market value of the land as of the time it is



taken. If there is a substantial delay between the date of valuation and the date of payment, the award must be modified to reflect the change of market value between those dates. The rule of *Kirby Forest* is binding on the California courts under the Supremacy Clause, United States Constitution Article VI and the Fourteenth Amendment of the United States Constitution, which makes the Fifth Amendment binding on states.

Although petitioners directly presented the federal question to the trial court three times, and to the California Court of Appeal and the California Supreme Court, the California courts have refused to apply the express mandates of federal law to this case, relying on state procedured grounds as an excuse for not following the United States Constitution.

This result cannot stand.

### STATEMENT OF CASE

The suit in eminent domain was filed by Condemnor on February 16, 1973, but the first deposit of probable just compensation for the land was not made until May 9, 1980.<sup>1</sup> Then Condemnor deposited \$519,000 for the property owners, and took possession of the property on August 13, 1980.

The case was tried in 1981,<sup>2</sup> using the valuation date of February 16, 1973, and reaching a fair market value of \$875,000. Condemnor appealed. The Morrisons cross-

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<sup>1</sup>Certain *de minimus* deposits for the immediate position of certain easement rights had been made certain. These had nothing to do with the taking of the 69 acres of land.

<sup>2</sup>This was the second trial. The case was first tried in 1974; Condemnor appealed, and the Court of Appeal reversed and re-

appealed, challenging the 1973 date of valuation and the rate of interest paid on the difference between the \$519,000 deposited in 1980 and the \$875,000 paid to the Morrisons in 1982.

On March 19, 1984, the Court of Appeal affirmed the valuation date, but reversed and remanded for the lower court to redetermine the market rate of interest to be paid on the principal value.

On May 21, 1984, the United States Supreme Court decided *Kirby Forest*, holding that condemnation awards must be modified when there is a substantial delay between the date of valuation and the date the judgment is paid. The Morrisons filed a petition for writ of certiorari to the United States Supreme Court. The petition was denied in November 1984, presumably because the case was not yet final, and had already been remanded to the trial court for further proceedings.

In the trial court, the Morrisons filed successive motions for relief from judgment under California Code of Civil Procedure §§ 128(a)(8) and 473, asking that the condemnation award be modified in accordance with *Kirby Forest* and the United States Constitution. App., pp. B-6-7.

The motions were denied without prejudice. While the law and motion judges saw the inequity of a seven years' delay in payment, they thought that California procedure prevented them from following the Constitution.

The case was set for trial on February 7, 1986. Lacking a California procedure equivalent to Federal Rule of Civil Procedure 60(b)(6) (the vehicle suggested by Justice

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manded the case. Throughout these proceedings, Condemnor paid no money to property owners for the land.

Marshall in *Kirby Forest*), the Morrisons brought a motion *in limine* to admit evidence at trial on the change of value of the property. This motion was denied by the trial judge. App., p. B-7. The applicable market rate of interest was decided, and a judgment was filed on June 11, 1986.

The Morrisons appealed the rulings on their two motions for relief from judgment and the motion *in limine* on the grounds that:

- The United States Constitution requires that the Morrisons be justly compensated for the value of their property at the time it was actually taken in 1980.
- The absence of an appropriate state procedure cannot abridge this fundamental constitutional guarantee.
- To satisfy the constitutional guarantee of just compensation, a limited hearing on the change in value must be granted.

The California Court of Appeal denied the appeal on November 25, 1987, claiming that it was not bound to follow the decision of the United States Supreme Court in this case because the judgment was final as to the amount of the award — another evasive procedural block. App., pp. B, 11-12.

This result cannot stand. This Court must remand the case for a hearing

limited to the presentation of evidence and arguments on the issue of how the market value of the property altered between [the date of original valuation] and the date on which the judgment was paid by the Government. *Kirby Forest*, 467 U.S. at 18.

## ARGUMENT

## I

**THIS CASE IS SQUARELY WITHIN THE HOLDING OF KIRBY FOREST AND ITS FACTS ARE EVEN MORE COMPELLING**

In the case of *Kirby Forest Industries v. United States*, *supra*, the United States Supreme Court unanimously held that a solution to the problem of delay between the date of valuation and the date of payment requires:

a procedure for modifying a condemnation award when there is a substantial delay between the date of valuation and the date the judgment is paid, during which time the value of the land changes materially. 467 U.S. at 17-18.

“Just compensation,” we have held, means in most cases the fair market value of the property on the date it is appropriated. 467 U.S. at 10.

In *Kirby Forest*, the parties had stipulated that March 6, 1979, the date of commencement of trial, was the date of taking. Kirby sought interest on the award from that date. The United States Supreme Court held that the taking of Kirby’s land did not occur until the award was paid three years later, and therefore no interest was due on the award.

However, the Court decided that it “still must determine whether the award itself satisfied the strictures of the Fifth Amendment.” 467 U.S. at 16.

- The Court ruled that it did not. *Id.*

To the extent that the amount received by Kirby, the fair market value of the land in 1979, was less than the

value of the land in 1982, the date of the taking, Kirby was denied just compensation. *Id.*

The case was remanded to the district court for taking additional evidence on the change in the value of the land between the applied date of valuation and the correct date of valuation pursuant to Federal Rule of Civil Procedure 60(b)(6).

The Supreme Court anticipated a hearing would be held at which:

the parties would not be permitted to question the adjudicated value of the tract as of the date of its original valuation; they would be limited to the presentation of evidence and arguments on the issue of how the market value of the property altered between that date and the date on which the judgment was paid by the Government. 467 U.S. at 18.

Such a procedure is precisely what the Morrisons request.

In the *Kirby Forest* case, the period between the date of valuation and the date of payment was only slightly more than three years and there was some dispute as to whether the value of the property had in fact increased or declined.

In compelling contrast to those facts, here the period of delay between the date of valuation and the date of payment was from 1973 to 1980, a period of more than seven years,<sup>3</sup> and there is no dispute whatsoever that the

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<sup>3</sup>Condemnor may claim the retrial was delayed by the Morrisons. However, this is a classic red herring and cannot excuse the fact that Condemnor deposited no money for probable compensation until May 9, 1980, even though the property taken was valued as of February 16, 1973. The great bulk of the delay was *not* caused by the Morrisons.

value of the property appreciated (even multiplied) dramatically over that period.

The federal condemnation procedure used in *Kirby Forest* is substantially different from California procedure.

But procedural differences between federal and state law do not and cannot obscure the fundamental constitutional requirement:

- A condemnation award must be modified when there is a substantial delay between the date of valuation and the date of compensation.

This constitutional requirement applies in this case, and the purported procedural barriers raised by the state courts are only attempts to evade the federal right.

## II

### THE ASSERTED STATE PROCEDURAL GROUND IS MERELY A MEANS OF EVADING THE DICTATES OF FEDERAL LAW

The Court of Appeal specifically recognized its obligation to follow decisions of the United States Supreme Court construing the scope of the Fifth Amendment applicable to the states under the Fourteenth Amendment, but asserted a state procedural ground for refusing to do so in this case. App., p. B-11. The asserted reason is

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Further, Condemnor may argue that the Morrisons stipulated to the 1973 date. In *Kirby Forest*, the parties stipulated to the date of valuation, and yet the District Court, the Court of Appeals, and the United States Supreme Court all agreed the stipulation did not preclude recovery by the property owner of such additional compensation as was necessary to provide the full and perfect equivalent in money of the property taken.



without merit, and seems to be simply a means of evading application of the federal rule in a misguided attempt to protect the public fisc.

The Court said:

While *Kirby* holds the Fifth Amendment requires compensation for a taking to be measured as of the date of the taking, where the date of valuation approval results in a substantially lower value, *Kirby* dealt with a judgment not final, or, stated differently, a judgment subject to amendment under Federal Rule of Civil Procedure 60(b).<sup>4</sup>

App., p. B-11.

But the posture of petitioners here is the same as the posture of the petitioners in *Kirby Forest*. In both cases, there was a final decision as to the amount of the valuation of the property, but not as to the amount of the interest. The question of interest was being appealed in *Kirby Forest*, and was on appeal in this case when the *Kirby Forest* decision was published. Thus, in this case, as in *Kirby Forest*, the total amount of the award was not yet determined when *Kirby Forest* became the binding rule. See *Redevelopment Agency of the City of Burbank v. Gilmore*, 38 Cal.3d 790, 797-98 (1985).

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<sup>4</sup>This statement misinterprets Federal Rule of Civil Procedure 60(b). That rule specifically states:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding . . .

Rule 60(b) applies to final judgments. Under the federal procedural system, a final judgment can be modified for "any other reason justifying relief from the operation of the judgment." California does not have an analogous rule allowing the reopening of closed cases.

The Court of Appeal's next sentence is thus also inaccurate:

Here, the judgment as to the amount of the award is final. In the circumstances presented, the judgment may not be modified or amended by the trial court to increase the amount of the award.

App., p. B-11.

The Court simply cited to a hornbook section on "Final Judgments Subject to Modification," 7 B. Witkin, California Procedure (3d ed. 1985) Judgment, §§ 80-83, pp. 515-520. This reference merely says that some final judgments are subject to modification, either through statutory power (primarily domestic cases) or through the inherent equitable power of the court. *Id.* It does not discuss eminent domain cases, which are treated to special procedures under California law (see California Code of Civil Procedure §§ 1230.010 to 1273.050) and the paramount protection of both the California and United States constitutions.

Further, the California Legislature has specifically defined "judgment" and "final judgment" in the eminent domain context:

"Judgment" means the judgment determining the right to take the property by eminent domain and fixing the amount of compensation to be paid by the plaintiff.

California Code of Civil Procedure § 1235.130.

"Final Judgment" means a judgment with respect to which all possibility of direct attack by way of appeal, motion for new trial, or motion under section 663 to vacate the judgment has been exhausted.

California Code of Civil Procedure § 1235.120.



Thus, to be final in both senses, a judgment in condemnation must

- fully determine the right to take and fully fix the amount of all compensation to be paid the condemnee, and
- be free of all possibility of appeal.

Here, neither requirement was met at the time the trial courts and appellate court denied property owners a hearing on the change in market value between the date of original valuation and the date the judgment was paid by the government.

At the time petitioners presented their motions to the trial court to comply with *Kirby Forest*, the trial court was deciding the correct amount of interest due on the award in order to fairly compensate the property owners. California law recognizes that the interest award is just as much a part of the just compensation due the property owner as the principal value of the land, and that in order to justly compensate the property owner, a market rate of interest must be determined and applied. *Redevelopment Agency of the City of Burbank v. Gilmore* (1985) 38 Cal.3d 790.

Indeed, the fixing of the amount of compensation is *still* under direct attack by this very petition for writ of certiorari. The judgment in condemnation is not yet final.

The Court of Appeal's conclusion does not stand up to scrutiny:

We conclude the finality of the judgment as to the award under California law makes inapplicable *Kirby's* Fifth Amendment concerns . . . Respecting as we do pronouncements of the United States Supreme Court, we do not read *Kirby* as overruling long-

established California law respecting finality of judgments.

There is no "long-established California law respecting finality of judgments" in circumstances such as these. Rather, the law applicable to eminent domain proceedings is clear that the judgment is not final before the full and perfect monetary equivalent of the property has been determined. *Redevelopment Agency v. Gilmore, supra*. And California law, like federal law, recognizes that the California courts must follow decisions of the United States Supreme Court in cases which are open and pending when the decision is announced. *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d 450, 455 (1962).

## CONCLUSION

The proper disposition of this matter was supplied in *Kirby Forest*. If three years' delay between the date of valuation and the date of payment and a disputed change in value was sufficient to warrant a hearing to amend the condemnation award in *Kirby Forest*, it should follow clearly that a seven-year delay and a dramatic increase in value compels a hearing to amend the condemnation award so as to satisfy the requirements of the Fifth Amendment for just compensation. As this Court stated in *Kirby Forest*:

In our view, such a reassessment is both necessary and sufficient to provide petitioner just compensation. 467 U.S. at 18.

The Morrisons have struggled through the California courts, only to have each court find some procedural barrier to giving them the just compensation which the Fifth Amendment requires. It falls to this Court to correct the past injustice, apply the clear direction of the

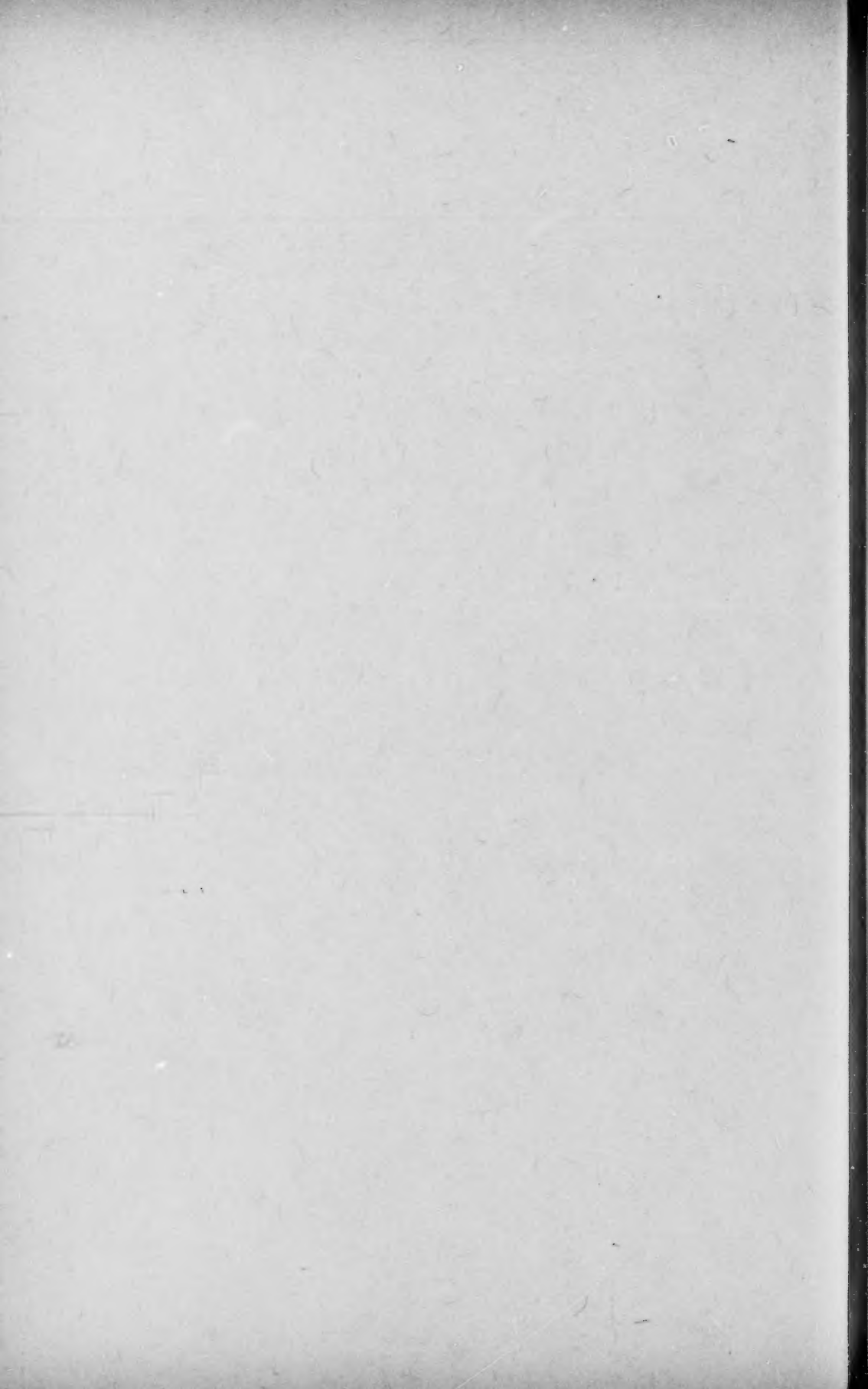
*Kirby Forest* case to the clear facts of this case, and provide these property owners with the just compensation for which they have waited so long.

This case is such a perfect mirror of *Kirby Forest* that the Court may wish to consider summary disposition by an order reversing the judgment and directing the California courts to hold the limited *Kirby Forest* hearing.

Respectfully submitted,

GOEBEL, SHENSA & BEALE

By: LOUIS E. GOEBEL  
MEAGAN J. BEALE  
*Attorneys for Petitioners*



A-1

APPENDIX A

ORDER DENYING REVIEW  
AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 1  
No. D004432  
S003745

IN THE SUPREME COURT  
OF THE  
STATE OF CALIFORNIA

IN BANK

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COUNTY OF SAN DIEGO,  
*Respondent,*

v.

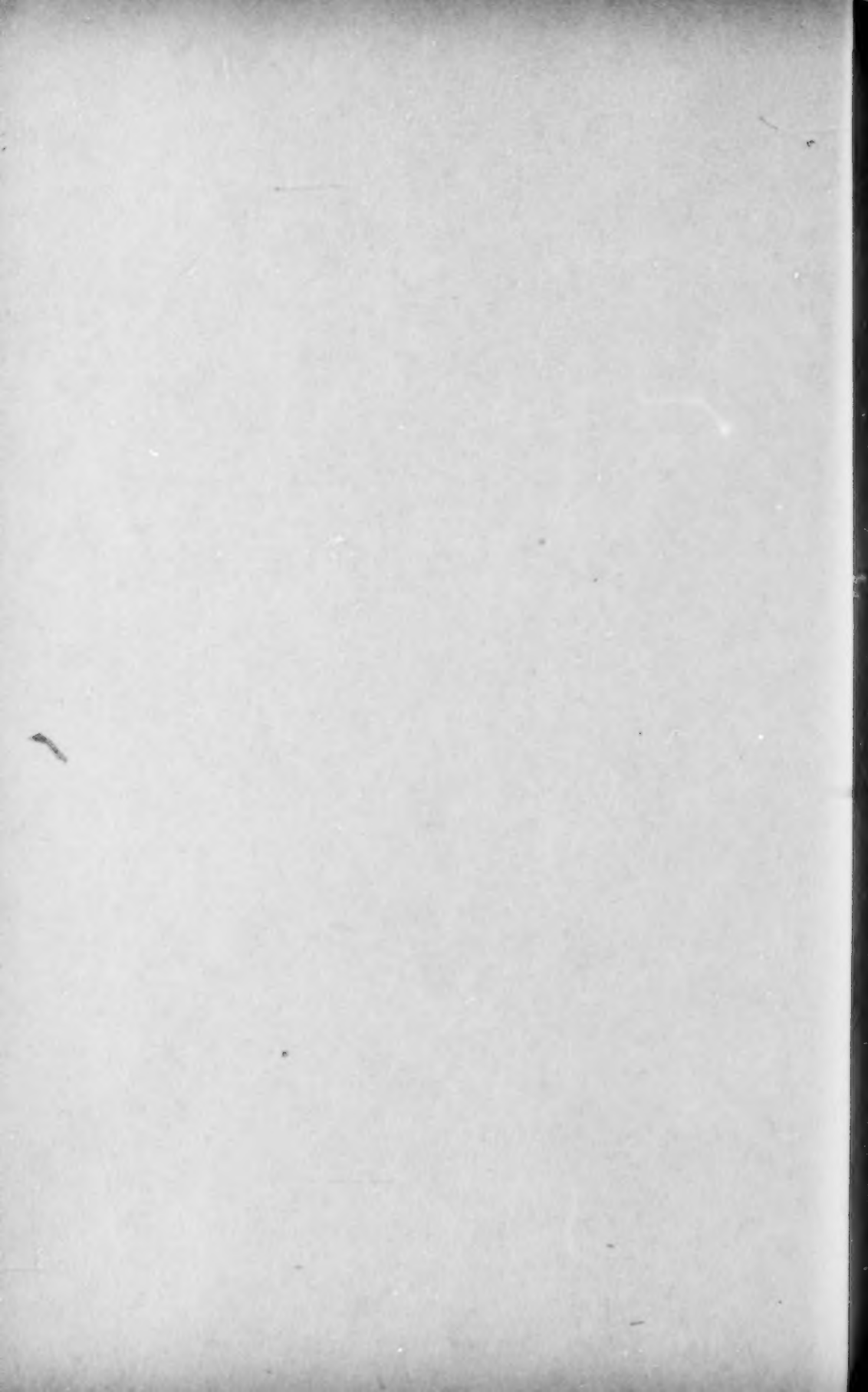
MORRISON et al.,  
*Appellants.*

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Appellants' petition for review DENIED.

Filed: February 17, 1988

LUCAS  
Chief Justice



APPENDIX B

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL  
FOURTH APPELLATE DISTRICT  
DIVISION ONE  
STATE OF CALIFORNIA

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COUNTY OF SAN DIEGO,  
*Plaintiff and Respondent,*

v.

L. E. MORRISON et al.,  
*Defendants and Appellants.*

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D004432  
(Super. Ct. No. 339813)

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Filed: November 25, 1987      Keenan G. Casady, Clerk

APPEAL from an order and judgment of the Superior Court of San Diego County, Thomas G. Duffy, Judge. Affirmed.

L. E. and Jean Morrison appeal a judgment after a hearing on our remand from their second appeal which in turn appealed a judgment entered on a jury verdict following reversal of judgment on the first trial of this eminent domain proceeding filed in 1973. This third time around, the Morrisons contend the court erred in refusing to admit evidence at the hearing on the remand of the change in value of their property after the original valuation date, February 16, 1973. The Morrisons contend *Kirby Forest Industries v. United States* (1984) 467 U.S. 1

requires the court to take additional evidence on the value of the land between the applied date of valuation, February 16, 1973, and the date the Morrisons claim the property was actually taken, May 9, 1980. The court ruled our remand required only a determination of the applicable rate of interest payable on the condemnation award, the judgment fixing the amount of the award was final and evidence of value at the date of taking was inadmissible at the remand hearing. We affirm.

## I

The County of San Diego started condemnation proceedings in 1973 to acquire 69.17 acres from the Morrisons for the development of Sweetwater Park. The case went to trial in 1974 to determine the fair market value of the property. The County appealed the judgment and we reversed. The second trial resulted in a judgment based on the fair market value of the property on February 16, 1973, the date the original complaint and summons were filed. The County appealed that part of the judgment awarding compensation for loss of business goodwill. The Morrisons cross-appealed, challenging the selected valuation date, February 16, 1973, and arguing the valuation date should be May 9, 1980, the date the County deposited probable compensation with the court. They also challenged an award of 7 percent interest, contending the rate should be based on the prevailing market rate of interest.

In *County of San Diego v. Morrison* (1983) 153 Cal.App.3d 233, we modified the judgment to exclude the award for loss of business goodwill, held February 16, 1973 was the correct valuation date and the Morrisons were not entitled to recover litigation expenses, and affirmed the judgment as modified. However, we reversed



the award of 7 percent interest on the amount of unpaid compensation and remanded the case "for further proceedings to determine the applicable market rate of interest." (Id. at p. 241.) Our Supreme Court denied hearing on June 21, 1984, and the United States Supreme Court denied certiorari November 26, 1984.

## II

During the pendency of the Morrisons' appeal to our Supreme Court, the United States Supreme Court on May 21, 1984, decided *Kirby Forest Industries, Inc. v. United States, Supra*, 467 U.S. 1. The Morrisons rely on *Kirby* for the proposition the court was required at the remand hearing limited, as we have said, to a determination of the applicable market rate of interest, to admit evidence of the value of the property as of May 9, 1980, the date the County deposited with the court probable compensation for the taking. The Morrisons contend the refusal of the court to admit such evidence is error because the failure to hear evidence of value as of May 9, 1980 constitutes a taking of their property without the just compensation required under the Fifth Amendment.

In *Kirby*, the government filed a complaint in condemnation (40 U.S.C. § 257) pursuant to Federal Rule of Civil Procedure 71A. *Kirby* notes fifth amendment "just compensation" obligations means "in most cases the fair market value of the property on the date it is appropriated" (at p. 10) and if disbursement of the award is delayed, the owner is entitled to interest to ensure he is placed "in as good a condition pecuniarily as he would have occupied if the payment had coincided with the appropriation." (*Ibid.*)

The court stated the central issue in *Kirby*:

"Title 40 U.S.C. § 257, in conjunction with Rule 71A of the Federal Rules of Civil Procedure, prescribes a procedure pursuant to which the United States may appropriate privately owned land by eminent domain. The central issue in this case is whether the manner in which the value of the land is determined and paid to its owner under that procedure comports with the requirement, embodied in the Fifth Amendment, that private property not be taken for public use without just compensation." (*Kirby, supra*, at p. 3.)

The court concluded the date of the taking and acquisition of title by the government in the "straight condemnation" proceedings prescribed in 40 United States Code section 257, the form of which is governed by rule 71A of the Federal Rules of Civil Procedure, was March 26, 1982, the date the government deposited in the registry of the district court the total amount of the judgment. As the taking occurred on that date, interest was not payable on the amount of the award from the date the complaint was filed. (*Id.* at p. 16.) However:

"The foregoing conclusion does not dispose of this case. We still must determine whether the award itself satisfied the strictures of the Fifth Amendment. As indicated above, petitioner is constitutionally entitled to the fair market value of its property on the date of the taking. [Citation.] Petitioner points out that \$2,331,202 represents the commission's best estimate of the value of the land on March 6, 1979. To the extent that that figure is less than the value of the land on March 26, 1982, the date of the taking, petitioner contends, it has been denied just compensation." (*Kirby, supra*, at p. 16.)

The government contended a fixed date for valuation was essential in eminent domain proceedings as the time within which the government will choose to acquire the property is unknown.<sup>1</sup> The court noted this circumstance and prediction of future value persuaded adoption by courts and commissions of "the convention of using the date of the commencement of the trial as the date of the valuation." (*Id.* at p. 17.)

"The government's argument provides a plausible explanation for the valuation procedure used in this case and other cases, but it does not meet petitioner's constitutional claim. However reasonable it may be to designate the date of trial as the date of valuation, if the result of that approach is to provide the owner substantially less than the fair market value of his property on the date the United States tenders payment, it violates the Fifth Amendment." (*Kirby, supra*, at p. 17.)

The court resolved the difficulty by suggesting a procedure for modifying a condemnation award "when there is a substantial delay between the date of valuation and the date the judgment is paid, during which time the value of the land changes materially." (*Id.* at pp. 17-18.) In *Kirby*, the procedure was readily available as the court of appeal remanded for reconsideration of the value of the property. The district court thus could adduce evidence pertaining

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<sup>1</sup>"The practical effect of final judgment on the issue of just compensation is to give the Government an option to buy the property at the adjudicated price. [Citation.] If the Government wishes to exercise that option, it tenders payment to the private owner, whereupon title and right to possession vest in the United States. If the Government decides not to exercise its option, it can move for dismissal of the condemnation action. [Citations.]" (*Kirby, supra*, 467 U.S. 1, 4.)

to alteration in value between the filing of the complaint and the taking.

"In other cases, such an option may not be available. However, the Federal Rules of Civil Procedure contain a procedural device that could do tolerable service in this cause. Rule 60(b) empowers a federal court, upon motion of a party, to withdraw or amend a final order for 'any . . . reason justifying relief from the operation of the judgment.' This provision seems to us expansive enough to encompass a motion, by the owner of condemned land, to amend a condemnation award. The evidence adduced in consideration of such a motion would be very limited. The parties would not be permitted to question the adjudicated value of the tract as of the date of its original valuation; they would be limited to the presentation of evidence and arguments on the issue of how the market value of the property altered between that date and the date on which the judgment was paid by the Government. So focused, the consideration of such a motion would be expeditious and relatively inexpensive for the parties involved. Further refinement of this procedural option we leave to the courts called upon to administer it." (*Kirby, supra*, at pp. 18-19, fns. omitted.)

The Morrisons contend *Kirby* mandates we require the trial court on the earlier remand to hear evidence of value of the property as of May 8, 1980 and, presumably, modify the judgment, long since final, accordingly. We disagree.

### III

The Morrisons first sought a *Kirby* evidentiary hearing as to value through filing on May 24, 1985 a Code of Civil Procedure section 473 motion seeking relief from the

judgment we affirmed in *Morrison* which became final November 26, 1984, upon denial of certiorari by the United States Supreme Court. That motion was denied September 20, 1985 "without prejudice to bring a different type of motion." Undaunted, the Morrisons filed on December 4, 1985, a motion for relief under Code of Civil Procedure section 128(a)(8) from the judgment we affirmed in *Morrison* again on the grounds the judgment violated the Fifth Amendment as explicated in *Kirby*. That motion was denied "without prejudice to bring again before the trial judge." Persevering, the Morrisons moved *in limine* to admit evidence on change in value of property, repeating the arguments made on the two earlier motions. The motion was denied. The remand hearing went forward and the applicable market rate of interest was stipulated to by the parties. As we have seen, the Morrisons appeal the supplemental judgment on remand which includes the denial of the *in limine* motion. Their failure to argue or brief issues other than the *Kirby* issue is an abandonment of the other issues. Thus, the appeal addresses only the *Kirby* issue.

#### IV

On the second appeal, the Morrisons challenged the February 16, 1973 valuation date, relying on later enacted law declaring the date of deposit of probable compensation, here May 9, 1980, as the correct date. *Morrison* held these eminent domain proceedings were subject to former title 7 of part 3 of the Code of Civil Procedure consisting of sections 1237 to 1267. We held the repeal of that title and its reenactment in 1975 included in new title 7 of part 3 (§ 1230.010 et seq.) did not govern our appellate review. In an unpublished part of *Morrison*, we determined the valuation date of the taking was February 16, 1973, under

former Code of Civil Procedure section 1249 which provided compensation and damages are deemed accrued at the date of issuance of summons and where the issue is not tried within a year then compensation and damages are deemed to have accrued at the date of the trial unless the delay was caused by the defendant. We held new section 1263.110 on which the Morrisons relied inapplicable. We said:

"The summons in this case was filed by the County on February 16, 1973 and that date was used as the valuation date at the first trial even though that trial began more than one year after the issuance of summons. The record does not reveal who or what caused the delay, but the parties apparently agreed on February 16, 1973 as the correct date. The Morrisons later agreed in a stipulation filed with the court to retain February 16, 1973 as the valuation date for purposes of retrial. Once that valuation date was determined at the first trial it became the applicable date for all further proceedings, including retrial. (*People v. Murata* (1960) 55 Cal.2d 1, 10.) This result is harsh, especially when several inflationary years separate the issuance of summons and retrial. Although the new law changes this result, it does not apply to this case and the Morrisons are therefore bound by *Murata*." (*Morrison, supra*, at p. 13, typed opn.)

The date of valuation, February 16, 1973, was not the date of the taking. May 9, 1980, the County deposited probable compensation for the taking. August 13, 1980, the County took possession of the property.<sup>2</sup>

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<sup>2</sup>The record does not disclose these dates which we recite from the Morrisons' brief. The County's brief tells us the deposit was made



*Kirby* construed 40 United States Code section 257 and Federal Rule of Civil Procedure 71A and concluded title to property subject to condemnation proceedings, orders and procedures passes to the government upon tender of payment. (*Id.* at pp. 3-4, 16.) As we have seen, *Kirby* went on to declare that under the Fifth Amendment the date of valuation did not control the amount the government had to pay if at the date the government acquired title the fair market value of the property substantially exceeded the value determined as of the valuation date, there the date of trial. (*Id.* at pp. 17-18.) Instead, the procedure prescribed by rule 60(b) empowering a federal court to "amend a final order" for any reason justifying relief from the operation of the judgment should be followed and an evidentiary hearing held to determine differences, if any, between the valuations of the property. While *Kirby* does not expressly so hold, we assume the federal court is empowered to increase the award to match the later valuation.

The parties do not refer us to comparable procedures under California law and we have found none. Instead, we perceive insurmountable barriers to the relief sought by the Morrisons.

The judgment affirming the award is long since final. Our remand for the limited purpose of determining the

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and an order for possession issued "May 9-16, 1980." The retrial commenced October 5, 1981. Former section 1253, applicable here, now incorporated into new section 1268.030, provided title to the property described in the final order of condemnation vests in the condemnor upon the date a certified copy of the final order is rendered. Recognizing possession of the property following deposit of probable compensation and passage of title following trial are different events occurring at different times, we accept the parties' apparent agreement May 9, 1980 is the date of the taking.

applicable market rate of interest was just that — a limited remand.

“When there has been a decision upon appeal, the trial court is reinvested with jurisdiction of the cause, but only such jurisdiction as is defined by the terms of the remittitur. The trial court is empowered to act only in accordance with the direction of the reviewing court; action which does not conform to those directions is void.” (*Hampton v. Superior Court* (1952) 38 Cal.2d 652, 655.)

*Rice v. Schmid* (1944) 25 Cal.2d 259, 263, discussed well-settled rules on the limitations of the trial court’s jurisdiction on remand as applied to a remand to determine damages as follows:

“Where a reviewing court reverses a judgment with directions to determine damages in accordance with the rules set forth in its opinion and to enter judgment for the plaintiff, the trial court is bound by the directions given and has no authority to retry any other issue or to make any other findings. Its authority is limited wholly and solely to following the directions of the reviewing court.”

A judgment rendered in violation of these rules is void.

“When a cause is remanded with directions to enter a particular judgment, it is the duty of the trial court to enter judgment in conformity with the order of the appellate court, and that order is decisive of the character of the judgment to which the appellant is entitled. The lower court cannot reopen the case on the facts, allow the filing of amended or supplemental pleadings, nor retry the case, and if it should do so, the judgment rendered thereon would be void.” (*Snoffer v. City of Los Angeles* (1936) 14 Cal.App.2d



650, 653; see also *Skaggs v. City of Los Angeles* (1956) 138 Cal.App.2d 269, 272; *Lial v. Superior Court* (1933) 133 Cal.App. 31, 33.)

While the trial court here was without jurisdiction to entertain a *Kirby* motion for an evidentiary hearing, our inquiry is not so limited. We are required to follow decisions of the United States Supreme Court construing the scope of the Fifth Amendment applicable to the states under the Fourteenth Amendment. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) While *Kirby* holds the Fifth Amendment requires compensation for a taking to be measured as of the date of the taking, where the date of valuation approval results in a substantially lower value, *Kirby* dealt with a judgment not final, or, stated differently, a judgment subject to amendment under Federal Rule of Civil Procedure 60(b). Here, the judgment as to the amount of the award is final. In the circumstances presented, the judgment may not be modified or amended by the trial court to increase the amount of the award. (See 7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, §§ 80-83, pp. 515-520.)

We conclude the finality of the judgment as to the award under California law makes inapplicable *Kirby's* Fifth Amendment concerns. Otherwise, judgments in eminent domain proceedings though filed and recorded would be subject to collateral attack. Respecting as we do pronouncements of the United States Supreme Court, we do not read *Kirby* as overruling long-established California law respecting finality of judgments. We express no opinion as to the prospective effect of *Kirby* on California

eminent domain procedures in proceedings with respect to the amount of award still pending the effective date of that decision.

Judgment affirmed.

/s/ BUTLER  
\_\_\_\_\_  
BUTLER, J.

WE CONCUR:

/s/ KREMER  
\_\_\_\_\_  
KREMER, P. J.

/s/ HUFFMAN  
\_\_\_\_\_  
HUFFMAN, J.\*

\*Assigned by the Chairperson of the Judicial Council.

## **PROOF OF SERVICE BY MAIL**

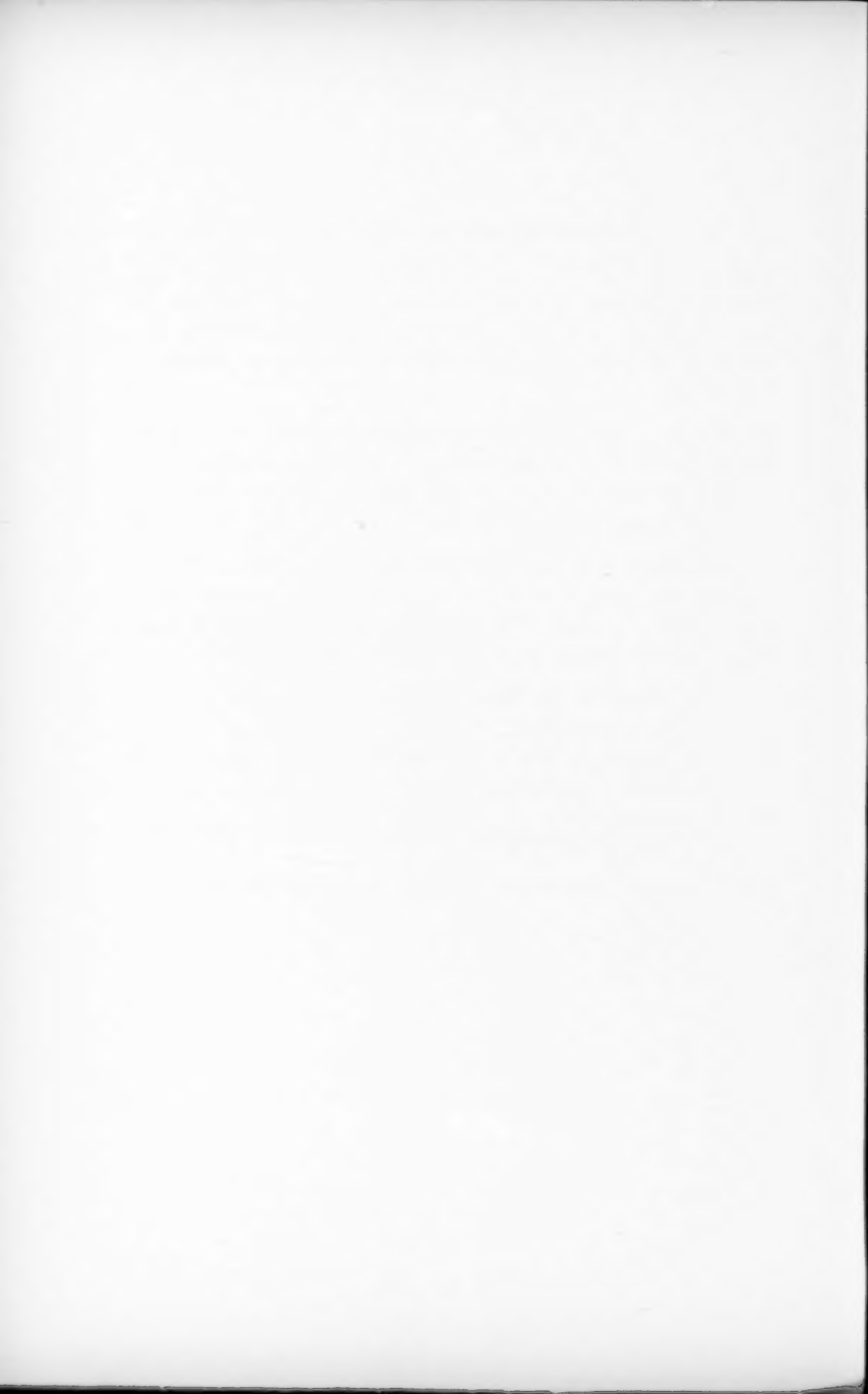
I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On May 16, 1988, I served the within Petition for Writ of Certiorari in re: "L. E. Morrison and Jean Morrison vs. County of San Diego" in the United States Supreme Court, October Term 1987, No. ....;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

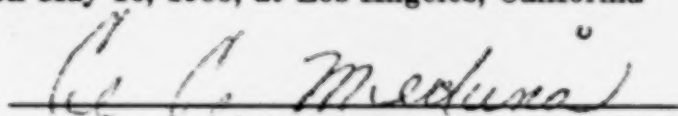
Lloyd M. Harmon, Jr. County Counsel  
County of San Diego  
Daniel J. Wallace, Chief Deputy  
1600 Pacific Highway  
Room 355  
San Diego, CA 92101

All Parties required to be served have been served.



I certify under penalty of perjury, that the foregoing is true and correct.

Executed on May 16, 1988, at Los Angeles, California

  
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